No. 97-1933

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

IN RE BANK OF SAIPAN, EXECUTOR OF THE ESTATE OF LARRY LEE HILLBLOM,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS,

Respondent.

CHUNG PO YANG, STEPHEN J. SCHWARTZ, PETER J. DONNICI, WILLIAM A. ROBINSON, and GREENPARK INTERNATIONAL, LTD.,

Real Parties in Interest.

On Petition For Writ Of Prohibition And/Or Mandamus To The United States District Court For The Northern Mariana Islands

REPLY TO THE BRIEF OF THE REAL PARTY IN INTEREST CHUNG PO YANG IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

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REPLY TO THE BRIEF OF THE REAL PARTY IN INTEREST CHUNG PO YANG IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

Introduction. Contrary to contentions of respondent Chung Po Yang ("Chung"), petitioner has not questioned the duty of federal courts to accord proper respect to international arbitration agreements. Instead, petitioner has attacked the district court's orders because (1) it had no subject matter jurisdiction to stay contempt proceedings pending against Chung in the probate court of the Commonwealth of the Northern Mariana Islands ("CNMI"), (2) it did not obtain subject matter jurisdiction to order arbitration since Chung had not fulfilled the statutory conditions precedent to removal and (3) it was required to abstain in the interests of federalism and comity when its jurisdiction (if any) was extremely tenuous.

I. AN EXTRAORDINARY WRIT IS THE SOLE MEANS TO CORRECT THE DISTRICT COURT'S USURPATION OF JUDICIAL POWER BY STAYING CONTEMPT PROCEEDINGS IN THE CNMI PROBATE COURT.

The stay order was not appealable. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 187 (1988). Chung argues that the petition "presents no issues that an appeal of a final order could not cure." (Chung's Opposition to Petition for Writ of Prohibition and/or Mandamus ["Opp. Br."] at 7). He has not and cannot identify any final order that the district court could issue that could "cure" the affront to the CNMI's sovereignty by staying

the CNMI court's imposition of sanctions for Chung's civil contempt. Even if the district court had had subject matter jurisdiction to remove petitioner's cross-claim from the probate court (and it did not), the contempt proceedings are irrelevant to any issue that the district court could decide in confirming or vacating an ultimate arbitration award.

The future possibility that the CNMI court might require dismissal of Chung's claims as a sanction for his contempt did not empower the district court to stay the contempt proceedings. Chung did not remove his claims from probate; he sought only to remove the cross-claim. The disposition of an unremoved claim in the CNMI court was none of the district court's jurisdictional business.

Nothing in the Convention on Recognition and Enforcement of Foreign Arbitral Awards (9 U.S.C. § 205) conferred any jurisdiction on the district court to stay contempt proceedings against Chung for two reasons: (1) An action cannot be removed to the federal court after trial has begun, and Chung had already been found in contempt and was merely awaiting sanctions. (2) Only an action that has been removed from a state court can be stayed, and the contempt proceedings had not been removed from the CNMI court.

Contrary to Chung's argument (Opp. Br. at 22, 23), the district court could not stay the contempt proceedings to preserve its own jurisdiction. This Court has strictly construed the "necessary in aid of its jurisdiction" exception to the Anti-Injunction Act (28 U.S.C. § 2283) which absolutely prohibits federal courts from enjoining state-

court proceedings unless the injunction falls within one of the three specifically defined exceptions to the Act. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977). Even if Chung could have accurately predicted that the CNMI court would require dismissal of Chung's claims as a sanction for contempt (and he could not), the most that could have happened would be to moot the cross-claim against Chung. But, as the Court explained in *Vendo Co.*, the "necessary in aid of its jurisdiction" exception in § 2283 has never been held to permit a federal court to issue an injunction to preserve a case or controversy.[1] The effect of the dismissal of Chung's claims would have had no more impact on the district court's jurisdiction than would petitioner's rejection of his claims after Chung was held in contempt and before sanctions were imposed. Neither petitioner nor the CNMI court was required to keep a probate controversy alive to preserve federal jurisdiction.

None of the cases that Chung cites to support the existence of federal jurisdiction to stay contempt proceedings is in point (Opp. Br. at 22-23). *Donovan v. City of Dallas*, 377 U.S. 408, 413-14 (1964), *United States v. Michigan*, 712 F.2d 242 (6th Cir. 1983), *Valentine Sugars, Inc. v. Sudan*, ___ F. Supp. ___ [1998 U.S. Dist. LEXIS 81-87] (E.D. La. 1998), *Specialty Bakeries, Inc. v. RobHal, Inc.*, 961 F.Supp. 822 (E.D. Pa. 1997), and *Complaint of Cosmopolitan*

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[1] Section 2283 provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or when it is necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Shipping Co., 453 F.Supp. 268 (S.D.N.Y. 1978) involve prior federal court proceedings with which state courts thereafter attempted to interfere. No prior federal proceedings existed before the CNMI court held Chung in contempt. *Anderson v. Marshall*, 856 F.Supp. 604, 606 (D. Kan. 1994) is even farther afield because it concerned a federal court's power to upset a state court order directed to fiduciaries in a case arising from an ex-husband's effort to compel the fiduciaries to eliminate his former wife as a beneficiary of the plan when she had a vested pension right and ERISA had preempted state law.

The district court's order staying the CNMI court's sanctioning Chung for contempt was outside the subject matter jurisdiction of federal courts. It could not be reviewed on an appeal from a final order confirming or vacating an arbitration award. Contrary to *Markham v. Allan*, 326 U.S. 490, 494 (1946), it interfered with the probate proceedings. Petitioner has more than met the standards for the issuance of an extraordinary writ. As this Court explained in *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 374, 382 (1953): "[T]he 'traditional use of the writ in appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so [quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943)].' " The stay order is exceptional, and the district court "clearly overstepped its authority in issuing the order." *Gulfstream Aerospace Corp.*, 485 U.S. at 290.

II. CHUNG'S FAILURE TO FULFILL THE STATUTORY CONDITIONS PRECEDENT TO REMOVAL OF THE CROSS-CLAIM DEFEATED REMOVAL JURISDICTION.

Chung was required to comply with the statutory prerequisites for the removal imposed by 9 U.S.C. § 205, even if he had not been foreclosed by his own conduct from belatedly seeking arbitration: He had to be situated as a "defendant" and all of his "co-defendants" had to formally consent to removal. Those conditions did not occur. The language of the removal statutes (9 U.S.C. § 205, 28 U.S.C. § 1441(b)) does not easily fit into probate proceedings because those statutes were not drafted with probate procedures in mind. However, as a claimant in the probate court, Chung was much more plaintiff-like than defendant-like. The cross-claim was in the nature of an offset against claims filed by Chung and by others in the probate proceedings. Even if the cross-claim was procedurally inartistic, he did not become a "defendant" when the offset was asserted against his claims.

No formal consent by his fellow co-cross-claim-defendants was ever filed. All that Chung offered were some informal letters, and even as to those, no evidence was ever offered by Chung that any of the signatories had any authority on behalf of their principals to consent for them. As *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254, 1262 (5th Cir. 1988) explained:

> But while it may be true that consent to removal is all that is required under section 1446 [the general removal statute], a defendant must do so itself. This does not mean that each defendant must sign the original petition for removal, but

> there must be some timely filed written indication from each served defendant, *or for some person or entity purporting to formally act on its behalf in this respect and to have authority to do so,* so that it has actually consented to such action. Otherwise, there would be nothing in the record to 'bind' the allegedly consenting defendant. [Emphasis added.]

841 F.2d at 1262, n. 11. One of the informal letters consented only to removal to Hong Kong. (App. at 68.)

The general federal removal statute (28 U.S.C. § 1441(b)), incorporated into the Federal Arbitration Act, provides only for the removal of a "civil action of which the district courts have original jurisdiction." A cross-claim against several probate claimants cannot arguably be deemed an "action" within the meaning of section 1441(b) or 9 U.S.C. § 205. Chung was plaintiff-like with respect to his claims, and he did not become a defendant by being called a "cross-claim defendant." Chung did not attempt to remove his claims, and he was not entitled to remove an offset to his claims.

Chung's reliance on *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939) (Opp. Br. at 14) is misplaced because the Court held that a state court's administration of a trust deprived the federal court of jurisdiction over the same subject matter, and, therefore, the federal court was without jurisdiction to enjoin the proceedings in the state court. The Court explained that when a judgment sought in both federal and state courts is strictly in personam and both courts have concurrent jurisdiction, both courts "may proceed with the litigation at least until judgment is obtained in one of them which

may be set up as res judicata in the other." (305 U.S. at 466.) However, if one of the actions is in rem or quasi-in-rem and the other court has in personam jurisdiction, the latter court must yield to the former. The Court stated:

> We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or to liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property. The doctrine is necessary to the harmonious cooperation of federal and state tribunals. While it has no application to a case in a federal court based on diversity of citizenship, wherein the plaintiff seeks merely an adjudication of his right or interest as a basis of a claim against the fund in the possession of a state court, *this is not such a case.* [Emphasis added].[2]

305 U.S. at 466-67.

The jurisdiction of the CNMI probate court was quasi-in-rem, and petitioner was trying to marshal assets of the estate. Chung's attempt to create federal jurisdiction was based solely on the removal statutes, not on diversity of citizenship, and Chung was trying to invoke

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[2] The italicized language is omitted from Chung's quotation at p. 14 of his Opposition Brief.

federal jurisdiction to escape from impending sanctions against him for contempt.

Chung's insistence that he was not foreclosed from belatedly seeking arbitration because he was never really litigating in the CNMI courts rings hollow. He not only filed claims in the CNMI probate court, opposed the cross-claim, and filed complaints in the CNMI courts outside of probate, he also contested the contempt charges against him. He had failed to take a first preliminary step to commence arbitration or even to ask petitioner informally to arbitrate for over two years before he ran to the district court to stop the imposition of contempt sanctions on him by the CNMI court. His actions speak far louder than his labels. Chung has understandably chosen to disregard the cases cited by petitioner that have prevented litigants from misusing the power to compel arbitration as a party's means of fleeing to another jurisdiction to escape adverse judicial rulings. (Petitioner's Writ Petition at 15.)

III. THE DISTRICT COURT SHOULD HAVE ABSTAINED TO RESPECT CNMI'S SOVEREIGNTY.

Although CNMI is a commonwealth, not a state, principles of federalism applicable to relations between federal and state courts apply also to federal-commonwealth relations. 48 U.S.C. § 1801.

The district court did not have a glimmer of subject matter jurisdiction to stay the contempt proceedings in the CNMI court, and it is difficult to imagine a more offensive federal intrusion into basic concepts of sovereignty than staying the imposition of sanctions for

contempt of court. The issuance of the writ is justified by the district court's "judicial 'usurpation of power.' " *Gulfstream Aerospace Corp.*, 45 U.S. at 189, quoting *Will v. United States*, 389 U.S. 90, 95 (1967), which quoted *DeBeers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945) [additional internal quotation marks omitted].

Even if the facts had created a visible shadow of removal jurisdiction, the court should have abstained to respect the Commonwealth's strong interest in developing its own judicial system and, as petitioner told the district court, protecting its sovereignty. Requiring Chung meticulously to follow procedural requisites to invoke removal jurisdiction accords the proper respect for CNMI's sovereignty, while at the same time doing no damage to the proper enforcement of international arbitration agreements.

WHEREFORE, petitioner prays that the writ of prohibition and/or mandamus issue to the United States District Court for the Northern District of the Mariana Islands and to the Honorable Alex Munson, Judge of said Court, as prayed.

Respectfully submitted,

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